(1908) 81 S. C. 1, 61 S. E. 1096, but clearly cases may arise where the assault is by such an overpowering and unexpected force that the carrier will be absolved from liability although his servants did nothing. See *Pittsburg, etc., Ry.* v. *Hinds* (1866) 53 Pa. 512; *New Orleans, etc., R. R.* v. *Burke* (1876) 53 Miss. 200. The charge of the trial court was, therefore, clearly erroneous, as stated in the principal case.

CONSTITUTIONAL LAW—FRANCHISES—CONFISCATORY RATE.—A street railway company operating under contract franchises specifying the fare to be charged, found that, owing to the changed conditions caused by the war, the fare specified had become confiscatory. The city refused to allow an increased fare and the company stopped operating and sought an injunction to prohibit the city from compelling further operation. *Held,* the injunction would not be granted. Where a rate specified in a contract franchise becomes confiscatory, it is a case of a hard bargain and not an unconstitutional taking of property. *Columbus Ry. Power & Light Co.* v. *Columbus,* U. S. Sup. Ct., Oct. Term 1918, No. 715, April 14, 1919.

In this case the court applied clear principles of contract law. The decision is chiefly important as showing that the doctrine of the unconstitutionality of confiscatory rates, which was extended to cases where the companies were operating without any express authority, their franchises having expired, *Denver* v. *Denver Union Water Co.* (1918) 246 U. S. 178, 38 Sup. Ct. 278; *Detroit United Ry.* v. *Detroit* (1919) 248 U. S. 429, 39 Sup. Ct. 151, will not be extended to give relief to a company where it has contracted to serve for the rate claimed to be confiscatory. For a full discussion of this subject, see 19 Columbia Law Rev. 144. There is an interesting suggestion in the opinion in the principal case that if it could be shown that the specified rate would make the performance of the contract, taking all the years of the term together, unremunerative, a different result might be reached. It is difficult to see how any increased severity of the situation could alter the application of the sound rules of law as set forth in this opinion, but it is possible that the court feels that some such modification may be found necessary to serve the public welfare.

CONTRACTS—AGREEMENT TO PAY BY LEGACY—DAMAGES—QUANTUM MERUIT.—The plaintiff served the testator as a housekeeper, at his request, and in reliance upon his promise to compensate her by leaving her a legacy. The testator did leave a legacy, but it was inadequate as compensation for the services rendered. *Held,* that the plaintiff could refuse the legacy, and sue for the value of her services upon a *quantum meruit. Schmetzer* v. *Broegler* (N. J. 1918) 105 Atl. 450.

In general, where the substantial breach of a contract by one party prevents the other party from fully performing his contract obligation, such other party may elect to repudiate the contract, and recover the value of his performance. *Chicago* v. *Tilley* (1880) 103

U. S. 146; *Gilbert & Banker Mfg. Co.* v. *Butler* (1887) 146 Mass. 82, 15 N. E. 76. While some courts allow the plaintiff under such circumstances to recover what his services were actually worth, irrespective of the contract price, *Johnston* v. *Pump Co.* (1918) 274 Mo. 414, 202 S. W. 1143; *Hemminger* v. *Western Assur. Co.* (1893) 95 Mich. 355, 54 N. W. 949; others, confusing the true nature of the action, limit the plaintiff's recovery to the contract price, although the reasonable value of the services rendered exceeded the price stipulated. *Edward Thompson Co.* v. *Decker* (1916) 200 Ill. App. 179; *Manufacturing Co.* v. *Investment Co.* (1913) 179 Mo. App. 447, 162 S. W. 691; *cf. Ludlauss* v. *Dale* (1875) 62 N. Y. 617; *Sprague & Wife* v. *Morgan & Wife* (1845) 7 Ala. 952. And where the services to be rendered by the injured party have been fully performed before the defendant's breach, many jurisdictions totally deny the plaintiff the right to restitution, *Anderson* v. *Rice* (1852) 20 Ala. 239; *Reams* v. *Wilson* (1908) 147 N. C. 304, 60 S. E. 1124; *Shropshire* v. *Adams* (1905) 42 Tex. Civ. App. 339, 89 S. W. 448; or, if the performance has given rise to a debt, allow the plaintiff to sue in *indebitatus assumpsit,* but make the measure of damages what the defendant promised to pay and not what the services were worth. Woodward, Quasi Contracts § 262; Sedgwick, Damages (9th ed.) 655f; see *Boyd* v. *Gale* (1903) 84 App. Div. 414, 82 N. Y. Supp. 932; *contra, Metcalf* v. *Gilbert* (1911) 19 Wyo. 331, 116 Pac. 1017. A defendant in default is generally made to return money received by him from the plaintiff, *Nash* v. *Towne* (1866) 72 U. S. 689, and it would seem that with equal justification he should be forced to return the value of services received by him from the plaintiff. And where, as in the instant case, the promise is not one to pay an express amount, but is to pay the reasonable value of services, the rule that restitution will be denied a plaintiff who has fully performed before the defendant's breach, is never applied; the measure of damages, whether the promise be express or implied, is the same in either general or special *assumpsit,* and the courts, therefore, permit recovery in *quantum meruit. Succession of Palmer* (1915) 137 La. 190, 60 So. 405; *Porter* v. *Dunn* (1892) 131 N. Y. 314, 30 N. E. 122; *Reynolds* v. *Robinson* (1876) 64 N. Y. 589. It is submitted that the principal case is sound and in accord with the weight of authority.

CONTRACTS—DEFENSES AVAILABLE AGAINST BENEFICIARY.—In an action by a materialman against the surety on a contractor's bond to pay for all materials used in a certain building, the surety pleaded nonperformance of a condition precedent by the obligee of the bond, who was the owner of the building, in failing to give notice of the default of the principal debtor. *Held,* three judges dissenting, the rights of the materialmen as beneficiaries became fixed upon furnishing the material and could not be defeated by the failure of the obligee to give notice. *Forburger Stone Co.* v. *Lion Bonding & Surety Co.* (Neb. 1919) 170 N. W. 897.

The cases seem to establish that the right of a beneficiary to sue the new promisor is not derived from or subordinate to his right